U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: NOV 0 1 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Rachel Nitsio
for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the decision to the Administrative Appeals Office (AAO), which dismissed the appeal. The petitioner filed a motion to reopen and reconsider the decision. On May 29, 2013, the AAO *sua sponte* reopened the matter. The director's decision will be affirmed, and the petition will be denied.

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a senior programmer analyst (QA). As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date. The director denied the petition accordingly. The petitioner appealed the director's decision. The AAO sent a Request for Evidence (RFE) to the petitioner on December 20, 2012. On March 25, 2013, the AAO dismissed the appeal, finding that the petitioner failed to respond to the RFE. The petitioner filed a motion to reopen and reconsider, stating that it had submitted a timely response. On May 29, 2013, the AAO reopened the matter, finding that the petitioner had submitted a timely response that had not been previously considered.

As set forth in the director's June 17, 2011 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. In addition, an issue concerning whether the job offer was *bona fide* is now noted.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on April 4, 2010. The proffered wage as stated on the ETA Form 9089 is $78,500.00 per year. The ETA Form 9089 states that the position requires a Master's degree in Computer Science, Engineering, Business, or a related field and one year experience in the job offered of senior programmer analyst (QA) or as a software engineer, test engineer, QA analyst, programmer, or consultant.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1987 and to currently employ 85 workers. On the ETA Form 9089, signed by the beneficiary on September 2, 2010, the beneficiary claimed to have begun working for the petitioner on August 1, 2009.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the following evidence of wages paid to the beneficiary:

- The 2010 Internal Revenue Service (IRS) Form W-2 states that the petitioner paid the beneficiary $54,297.84.
- The 2011 IRS Form W-2 states that the petitioner paid the beneficiary $64,798.14.
- The 2012 IRS Form W-2 states that the petitioner paid the beneficiary $1,626.35.

The amounts paid to the beneficiary were less than the proffered wage in each year. As a result, the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which in 2010 was $24,202.16, in 2011 was $13,701.86, and in 2012 was $76,873.65.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co.*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See also Taco Especial*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding

> depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River St. Donuts, 558 F.3d at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang,* 719 F. Supp. at 537 (emphasis added).

In response to the AAO's December 20, 2012 RFE, the petitioner submitted audited financial statements for 2010 and 2011. The 2010 audited financial statement indicates a net income of $72,070.00 and a net current asset amount of $518,684.00 and the 2011 audited financial statement indicates a net income of $223,820.00 and net current asset amount of $717,480.00. The petitioner also submitted its 2012 balance sheet, however, it indicates that no audit was performed. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As a result, the 2012 balance sheet may not be considered in determining the petitioner's ability to pay the proffered wage.

Although these amounts are sufficient to demonstrate the petitioner's ability to pay the difference between the proffered wage and wages paid to the instant beneficiary for 2010 and 2011, USCIS records indicate that the petitioner has filed more than 150 petitions since 2007.[1] The petitioner must demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). In addition, the petitioner is obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. In response to the director's May 3, 2011 RFE, the petitioner submitted a list of 26 sponsored worker names, proffered wages, and paid wage amounts for 2010. In response to the AAO's December 20, 2012 RFE, the petitioner submitted a list of 14 additional sponsored workers (and three duplicates from the original list for a total of 17 names on the new list) with their respective proffered wages and receipt numbers and 35 sponsored H-1B petition workers, 20 of which were also listed as beneficiaries of an immigrant visa. The petitioner also submitted IRS Forms W-2 for some of the indicated sponsored workers.

The evidence submitted indicates that the difference between the actual wages paid and the proffered wages is $688,265.00 in 2010, $224,601.00 in 2011, and $747,476.00 in 2012. The petitioner's audited financial statement does not indicate it had the ability to pay the amount indicated in 2010 either through the net income or net current assets for the listed workers. It is unclear if the

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[1] The total number of immigrant and non-immigrant petitions filed by the petitioner number is in excess of 1,600 since its inception. The petitioner filed 53 unique Forms I-140 and 154 Forms I-129 from 2007 onward (some of the workers for whom the petitioner filed a Form I-140 were also the beneficiary in Forms I-129 filed by the petitioner, those workers only appear in the count for Forms I-140). Some of the Forms I-129 filed in 2007 and 2008 were not pending during the timeframe of the instant petition as those visas were for a one-year duration.

petitioner submitted evidence concerning all workers with a pending petition in 2010, however, the petitioner's financial statements did not demonstrate the ability to pay to those workers specified by the petitioner. Additionally, the petitioner did not submit evidence regarding wages paid to all of the other sponsored workers listed in response to the director's RFE for 2011 or 2012. Without complete information, we are unable to determine whether the petitioner had the ability to pay the difference between the actual wage paid and the proffered wage to all sponsored workers in 2011 or 2012. As a result, the petitioner has not submitted sufficient evidence of its ability to pay the proffered wage to all sponsored workers in 2010, 2011, and 2012.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the proffered wages to all of its beneficiaries as of the priority date through an examination of wages paid to the instant beneficiary, or its net income or net current assets.

Counsel asserts that 13 of the sponsored workers resigned from the company and the petitioner requested that their petitions be withdrawn. It is noted that only one of the workers named as having resigned appeared on the petitioner's list of sponsored workers. In addition, that one worker that appeared on a previous list of sponsored workers was the beneficiary of an H-1B visa sponsored by the petitioner, so the petitioner would have a wage obligation to this worker through the date of resignation, which appears to be 2012 or later based on Forms W-2 submitted demonstrating wages paid for 2010, 2011, and 2012.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Sonegawa,* 12 I&N Dec. at 614-15. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business

expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has filed petitions to sponsor more than 1,600 workers since its inception, including more than 200 since 2007. It did not demonstrate its ability to pay the proffered wage to the instant beneficiary and the other sponsored workers in any year. The petitioner did not submit any evidence of its reputation or standing within the community or evidence that it experience an uncharacteristic year related to income or expenses to liken its situation to the one presented in *Sonegawa*. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Beyond the decision of the director,[2] no *bona fide* job offer appears to exist. On the ETA Form 9089, Section H, the petitioner listed the "primary worksite (where work is to be performed)" as Section H also indicates that "Travel [would be] involved to unanticipated client locations within US." It is noted that the beneficiary resided in Massachusetts according to the labor certification signed in September 2010, but Pennsylvania according to the 2010, 2011, and 2012 IRS Forms W-2. A site visit was conducted of the premises listed on the Form I-140 and ETA Form 9089 during which Vice President of Operations, indicated that the consultants for the company did not work at the New Jersey location. Although the Form I-140 indicates a workforce of 85, the site visit indicated that the premises in New Jersey could not accommodate more than 30 employees.

It is noted that the approved labor certification does mention travel at client sites, but it does not indicate that the majority of the work would be done at a third party location. The language in H.11 does not indicate placement at end-user client sites or remote work. Without such language, the DOL did not have notice of the actual geographic area of intended employment and could not accurately determine the prevailing wage for the position. 8 U.S.C. § 204.5(l)(3)(i).

The evidence in the record does not establish that the petitioner either has the physical space to employ the beneficiary at the location indicated on the ETA Form 9089 as the primary workspace nor does it establish that it intended to employ the beneficiary at that workspace.[3] Therefore, we find that the petitioner has not established that a realistic and *bona fide* job offer exists, as it was described on the approved labor certification application.

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[2] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

[3] Mr. Govindarajan also indicated that the beneficiary is no longer employed by the petitioner, but that the petitioner would be willing to employ the beneficiary again in the future.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The petition is denied.